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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 793

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

MOTION TO AFFIRM
or in the alternative
MOTION TO DISMISS.

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THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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The State of Illinois and Illinois Commerce Commission, two of the appellees in the above entitled cause, pursuant to Rule 16 of the Revised Rules of this Honorable Court, respectively move this court to affirm the decision of the court below upon the ground that the question submitted is so insubstantial as to require no further argument, or in the alternative, to dismiss the appeal as not being one which is reviewable upon direct appeal.

STATEMENT OF FACTS.

In a unanimous decision issued January 13, 1958, this court in *Chicago, Milwaukee, St. P. and P. R. Co.* v. *Illinois, et al.*, 355 U. S. 300, 2 L. ed. (2) 292, upheld the action of the lower court in setting aside an order of the Interstate Commerce Commission which had increased the intrastate suburban fares of the Railroad in the Chicago area. Although the order of the Interstate Commerce Commission had been voided by the decree of the District Court, the Railroad was allowed to collect the higher fares pending appeal to this court under an order of the District Court entered June 18, 1956 which stated:

"IT IS ORDERED:

1. The injunction prescribed by decree of this Court entered June 14, 1956, is stayed pending disposition of the appeal from that decree, heretofore taken to the Supreme Court of United States, and subject to the conditions below set forth.

2. The excess fares collected by the Milwaukee Road after April 20, 1956, pursuant to order of the Interstate Commerce Commission set aside by the decree, shall be impounded and held by the Milwaukee Road in a separate fund so that in the event the decree is affirmed, or the appeal therefrom is dismissed or discontinued, the excess fares may be refunded to the persons who paid them. The Milwaukee Road shall issue suitable coupons or other evidence to such persons showing their payment of the excess fares.

3. If the decree is reversed and injunction dissolved, the Milwaukee Road shall retain the impounded excess fares and may transfer them to its general funds.

4. If the decree is affirmed or the appeal is dismissed or discontinued, the Milwaukee Road shall post immediately in its suburban stations, notice that refund will be made of the excess fares to the persons who have paid them.

5. Six months after the posting of such notice, the Milwaukee Road shall file a report in this court setting forth the total amount of the excess fares impounded, the total amount of refunds made therefrom, and the balance of the impounded excess fares then unclaimed. At the same time, the Milwaukee Road shall deposit with the Clerk of this Court the amount of such unclaimed balance.

6. Thereupon, upon petition of plaintiffs, and evidence showing reasonable expenses (including reasonable attorneys' fees) incurred by each of the plaintiffs in the proceeding before the Interstate Commerce Commission, reviewed in this case, in prosecuting this case in this Court, and in connection with the appeal from the decree herein, the Court shall order that the amount of said reasonable expenses shall be paid to plaintiffs from the unclaimed balance of the impounded excess fares. Any remaining balance shall be retained by the Clerk subject to such disposition as this Court may direct.

7. The Court retains jurisdiction of this case to enter such further orders as may be required to carry this order into effect."

The order of June 18, 1956 was entered upon the motion of counsel for the Railroad and was an agreed order as counsel conceded at the proceedings held on February 28, 1958. (See Appendix A of Jurisdictional Statement, page 4a.)

After the opinion of this court (355 U. S. 300) and the filing of the mandate, the Railroad on February 10, 1958 filed a motion seeking to continue to hold the excess impounded fares pending the remandment to the Interstate Commerce Commission, rather than to immediately post notices and proceed with the refund in accordance with the provisions of the order of June 18, 1956. The motion of the Railroad was denied February 28, 1958 and it was instructed to forthwith comply with the provisions of the June 18, 1956 order pertaining to the refunding of the

impounded fares. On March 3, 1958, a notice of appeal to this court was filed from the order of February 28, 1958 and a request for supersedeas presented to this court which was denied on March 17, 1958.

The appeal prayed by the Railroad on March 3, 1958 from the order of February 28, 1958, which denied any modification or change in the order of June 18, 1956, was not prosecuted by the Railroad and the appeal to this court was dismissed on May 12, 1958. In compliance with the order of June 18, 1956, the Railroad made the refunds specified in said order, filed the report directed by paragraph 5 thereof and deposited with the Clerk of the District Court the amount of the unrefunded balance, aggregating $229,565.5..

The order which the Railroad now seeks to have reviewed is the order of December 24, 1958 denying the application of the Milwaukee Railroad for the entire unrefunded balance. (See Jurisdictional Statement, Appendix B, page 6a.) The opinion of the lower court (set forth as Appendix A to the Jurisdictional Statement) stated:

> "The agreed order of June 18, 1956, was a final and favorable determination of the right of plaintiffs to receive payment from the unclaimed balance of impounded excess fares covering their reasonable expenses (including reasonable attorneys' fees) incurred by each of them as referred to in said order. The only reservation of jurisdiction in regard thereto was for the purpose of entering such further orders as may be required to carrying that order into effect."

THE ISSUE.

Can the order of the District Court entered June 18, 1956, having been entered by consent of all the parties and now more than two years old with one attempt to modify (the motion of February 10, 1958) having been denied with the appeal from such denial having been dismissed, be now modified or changed upon the motion of the Railroad?

JURISDICTION OF THIS COURT.

While the order appealed from was entered by a 3-Judge District Court and appellant contends that jurisdiction of this court is conferred by 28 USCA 1253, the order on appeal is neither one granting or denying an interlocutory nor permanent injunction. While we prefer that this court affirm the order of the lower court and thereby bring an end to this matter, we would be less than candid if we did not at least raise the question of jurisdiction on a direct appeal.

ARGUMENT.

1. THE PRESENT CLAIM OF THE RAILROAD TO THE ENTIRE BALANCE OF THE UNREFUNDED MONEY CONSTITUTES A COLLATERAL ATTACK ON THE ORDER OF JUNE 18, 1956.

The order of June 18, 1956 was a consent order agreed to by the Milwaukee Railroad and was entered at its behest. That order contains specific provisions as to the disposition of the funds collected during the appeal—(i) in the event the Railroad is successful, and (ii) in the event the plaintiffs are successful. Since the affirmance of the basic case by this court, the Railroad has refunded to all those people making claim; has filed its report showing the amounts collected, the amount refunded and the balance; and has deposited with the Clerk of the District Court the unrefunded balance. Consequently, not only was the order of June 18, 1956, with all of its terms, entered by consent of all the parties, but the Railroad has complied with more than half of that order. The Railroad is not only estopped to contest the remaining of the provisions of the order of June 18, 1956, but that order is not subject to collateral attack. See 37 Am. Jur. 516 (Motions, Sec. 36) where it is stated:

> "Orders, like judgments, are not ordinarily subject to collateral attack, except for want of jurisdiction or fraud in their procurement."

The order was clearly one which the District Court had power and authority to enter, and being a consent order, could not have been procured by fraud.

2. THE ORDER OF JUNE 18, 1956 WAS AN ORDER BY CONSENT AND CANNOT BE CHANGED OR MODIFIED UPON MOTION OF ONLY ONE OF THE CONSENTING PARTIES.

Even if the order of June 18, 1956 were neither final nor otherwise impervious to collateral attack, the Railroad cannot, by motion, change or modify the terms of that order. As we have shown, the order was entered by consent. In such a situation no change can be made upon the request of only one of the consenting parties. See *May* v. *Moss,* 212 Fed. (2) 400.

Although the order of June 18, 1956 stated that the court retain jurisdiction to enter further orders, such retention was solely for the purpose of entering further orders "as may be required to carry *this order* into effect." (Emphasis added.) There was no retention of jurisdiction to issue other orders contrary to or at odds with the order of June 18, 1956. Any order which would now give the Railroad all of the unrefunded money without first allowing expenses and attorneys' fees would be counter to that order and not in aid thereof.

3. THE ORDER OF DECEMBER 24, 1958 IS NOT REVIEWABLE BY THIS COURT ON A DIRECT APPEAL.

The order sought to be appealed directly to this court is not one granting or denying an injunction. It is at most an order disposing of a fund which has been impounded by the District Court.

The mere fact that the order was the creation of a 3 judge court does not make it one appealable directly to this court. *Public Service Commission* v. *Brashear Freight Lines,* 312 U. S. 621, 626, 85 L. ed. 1083; *Public Service Commission* v. *Columbia Terminals,* 309 U. S. 620, 84 L. ed. 984; *Public Service Commission* v. *Brashear Freight Lines,* 306 U. S. 204, 207, 83 L. ed. 608; *Phillips* v. *United States,* 312 U. S. 246, 85 L. ed. 800.

Orders affecting the disposition of impounded funds are not decrees granting or denying an injunction authorizing a direct appeal, *American Insurance Company* v. *Lucas*, 314 U. S. 575, 86 L. ed. 466, and such an appeal will be dismissed.

CONCLUSION.

For the foregoing reasons we respectfully submit that the decision of the District Court in refusing to change or modify its order of June 18, 1956 is correct and that the order should be affirmed; or, the appeal be dismissed as being improperly appealed to this court.

Respectfully submitted,

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Dated: April 22, 1959.